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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1957

No. 303

ALASKA INDUSTRIAL BOARD and CARL E. JENKINS,

Petitioners,

vs.

CHUGACH ELECTRIC ASSOCIATION, INC., a corporation, and GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LTD., a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on April 29, 1957.

OPINION BELOW.

The opinion of the District Court is found in the printed transcript of record used in the Court below, at pp. 56-62, and is reported at 122 F. Supp. 210. The opinion of the Court of Appeals (R. 88-106), as yet unreported, is printed in the Appendix hereto, *infra*, at pp. 1-27.

JURISDICTION.

The judgment of the Court of Appeals, dated April 29, 1957, was entered on that date (R. 107), and is printed in the Appendix, *infra*, pp. 28-29. Appellees filed their petition for a rehearing, but this was denied on June 7, 1957 (R. 109). The jurisdiction of this Court is invoked under Title 28, U.S. Code, Sec. 1254 (1).

QUESTION PRESENTED.

In an industrial accident a workman lost his left arm, his right leg and four toes of his left foot. By reason of the loss of the arm and leg, the workman became entitled to a scheduled lump-sum award of compensation for "total permanent disability." His left foot, however, was slow in healing, and this resulted in the workman being totally (but only temporarily) disabled from earning a living, for a limited period of time.

During the period of healing of the left foot, and after having received the award for the loss of an arm and leg, was this workman entitled to compensation for total temporary disability?

STATUTES INVOLVED.

This case involves the interpretation of certain provisions of the Alaska Workmen's Compensation Act, the relevant portions of which are printed in the Appendix, *infra*, pp. 30-37.

STATEMENT.

The facts, essential to a consideration of the question presented here, are as follows:

1. On September 21, 1950, while in the course of his employment with Chugach Electric Association, Carl E. Jenkins came into contact with a high voltage electric line and received serious injuries. This resulted in a series of three surgical operations, i.e., the amputations of Jenkins' left arm near the shoulder, the right leg below the knee, and four toes of his left foot. (R. 13-14, 15-16, 18-20, 41-42, 56). The last amputation (the right leg) took place on October 28, 1950 (R. 46).

2. The left foot failed to heal (R. 12-16, 18, 22-27), and was still under treatment at the time of the doctor's last report of December 17, 1953 (R. 26-27). Because of this, Jenkins had been unable to secure gainful employment (R. 19, 27, 42), and was thus in a state of continuing disability—temporary in duration, but while it lasted, total in scope.

3. Following the injury, respondents paid Jenkins compensation for temporary total disability under the "Temporary Disability" provision of the Alaska Workmen's Compensation Act, Sec. 43-3-1, Alaska

Compiled Laws Annotated 1949. This was paid at the rate of $95.34 a week for approximately 38 weeks—a total of $3,645.00 (R. 36, 42).

4. On July 25, 1951, respondents reversed their position. They decided that Jenkins had been totally and permanently disabled since October 28, 1950, when the last amputation took place. They recognized that he was entitled to $8,100.00, as the scheduled lump-sum award for the loss of an arm and a leg,[1] but deducted from it the sum of $3,645.00 previously paid as temporary total disability. Hence, respondents sent to Jenkins on July 25, 1951, their check for $4,455.00 —for the purpose of closing the claim (R. 44).

5. Jenkins then applied to the petitioner, Alaska Industrial Board, for continuing benefits for temporary disability, despite the allowance of the lump-sum award for permanent total disability (R. 39-40). This application was granted by the chairman of the Board on November 12, 1952, on the ground that temporary total disability had continued since October 28, 1950. He awarded Jenkins $3,645.00, which respondents had deducted from the $8,100.00 lump-sum payment, and in addition awarded further compensation for total temporary disability caused by the failure of the left foot to heal and "until a medical end result is reached." (R. 41-45.)

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[1]Sec. 43-3-1, ACLA 1949. "[Loss of members as total permanent disability.] The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, or hearing in both ears, shall constitute total and permanent disability and be compensated according to the provisions of this Act with reference to total and permanent disability."

6. On February 6, 1953, after a review by the full membership of the Board, the chairman's decision and award was vacated and set aside by the other two members. Here it was held that since Jenkins had suffered a "total permanent" disability on October 28, 1950, when the final amputation took place, no compensation for "total temporary" disability was thereafter payable (R. 46-47). However, Jenkins was allowed $476.70 as total temporary disability compensation for a period of 35 days prior to the operation of October 28, 1950 (R. 47).

7. Later the matter was considered again, and on January 8, 1954, the Board reversed its prior action of February 6, 1953. This time the Board held that a condition of total temporary disability had existed on and after October 28, 1950, and that it still continued since no "medical end result" had been reached (R. 52). This meant that Jenkins was entitled to temporary disability compensation at the rate of $95.34 a week from October 28, 1950 and until his left foot had either healed or had been restored physically as far as possible by medical means.

8. Thereafter, respondents instituted this action in the District Court to set aside the Board's decision (R. 28). On July 27, 1954, that Court filed its written opinion reversing the Board's action and holding that an award for temporary total disability could not be granted for physical disability arising from the same accident in which a scheduled, lump-sum award for "total permanent disability" had been granted (R. 56-60). Judgment was entered for respondents on

July 30, 1954 (R. 61-62). Petitioners applied for rehearing (R. 62-63), but this was denied by the District Court on October 7, 1954 (R. 64).

9. An appeal was taken by petitioners (R. 63), and the matter was argued twice: once, before the regular 3-judge division of the Court of Appeals (R. 84), and then later, before the Court below sitting in banc (R. 85-86). On April 29, 1957, the Court below upheld the ruling of the District Court. It was held that after a workman had lost an arm and a leg and had thus suffered injuries severe enough to entitle him to a scheduled award for "total permanent disability," he could not thereafter be awarded weekly benefits for "total temporary disability"—despite the fact that other and separate injuries, suffered in the same accident, were slow in healing and thus prevented the workman from becoming gainfully employed for a limited period of time.

10. Chief Judge Denman and Judge Pope dissented. It was their opinion that a liberal construction of the Alaska Workmen's Compensation Act required a holding that Jenkins was entitled to temporary disability compensation during the period of healing of his left foot, despite the fact that he had received a fixed, lump-sum award just by reason of having had two amputations of other members of his body. They felt that the majority had interpreted the Alaska Act harshly and unreasonably, and had established a most harmful rule of construction for the circuit. They, therefore, urged that the judgment of the District Court be reversed.

REASONS FOR GRANTING THE WRIT.

1. It has been firmly established that workmen's compensation statutes, in order to effect their humanitarian purposes, should be liberally construed in favor of the injured workman.[2] As recently as last year this Court again recognized and made practical application of this rule in its construction of the Longshoremen's and Harbor Workers' Act. In *Czaplicki v. S.S. Silver Cloud,* 351 US 525, 100 L ed 1387 (1956) it was held that the statute should be construed so as to allow Czaplicki to enforce, in his own name, the rights of action that were his originally. Recognizing the existence of contrary holdings, this Court nevertheless said (p. 531):

> "We think, however, that allowing suit by the employee in these circumstances is the *proper way to ensure him the rights given by the Compensation Act.*" (Emphasis added.)

But despite this universally accepted and continually repeated proposition, narrow and unjust constructions are frequently being urged.[3] A striking example is the inescapable result of the majority opinion in the instant case: that under the Alaska Act a workman who is less severely injured and suffers less actual disability, can receive more compensation than one who is more seriously disabled.[4] When the statute is logi-

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[2] *Baltimore & Philadelphia S. S. Co. v. Norton,* 284 US 408, 414, 76 L ed 366, 370 (1932); *Voris v. Eikel,* 346 US 328, 333, 98 L ed 5, 10 (1953); *Pillsbury v. United Engineering Co.,* 342 US 197, 200, 96 L ed 225, 229 (1952).

[3] NACCA Law Journal—Vol. 15, pp. 157-158.

[4] See dissenting opinion of Chief Judge Denman (R. 102).

cally and readily susceptible of an interpretation that will avoid this harsh result,[5] then the injustice of the decision of the Court below and its departure from this Court's oft repeated rule of liberal construction is so clear as to call for this Court's power of supervision and review.

The Court of Appeals for the First Circuit has stated that under the Longshoremen's and Harbor Workers' Act there is no actual inconsistency between a man being totally disabled *for the purpose of the Act,* and possessing a present ability to do work of a limited nature.[6] Neither, then, should there be any actual inconsistency between a man being totally and permanently disabled for the purposes of the Alaska Act, and at the same time not having a present ability to do work of even a limited nature by reason of a *temporary* disability caused by the failure of an injured member of his body to heal—this injury having had nothing to do with the awarding of compensation for total and permanent disability.

The Alaska Act encompasses, with few exceptions, every person who employs one or more employees in

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[5]See succinct statement of Judge Pope in his dissenting opinion (R. 106):

"I am persuaded that if we would not import into this unique statute any 'basic principle' or 'conclusive presumption' not actually found in the act itself, and would just take this statute by its four corners and apply the usual liberal construction in favor of the injured workman, we would have to find that it provides that the fixed award for certain specified injuries was not intended to bar further compensation for the temporary loss of such earning power as remained after the injury."

[6]*Eastern S. S. Lines v. Monahan*, CA-1, 1940, 110 F.2d 840, 841.

connection with any business, occupation, work, employment or industry carried on in the Territory.[7] And if any such employee is injured while earning his livelihood, his sole remedy is under the Act; his right to compensation under the statute being exclusive of all rights and remedies at common law or otherwise.[8]

Certainly, then, the question decided by the Court below is one of real importance to the Territory of Alaska and its citizens. A rule of construction has been established which is far reaching in its consequences, for the lives and livelihood of not merely a few, but of many, persons in Alaska will be affected.

And this decision is of more than local concern. Because of the relatively small labor force in Alaska and the seasonal nature of employment there, there is a great migratory movement of workers from the Pacific Coast States to Alaska each year for the Summer's activities.[9] With respect to the fishing industry, this Court has noted that fact in the *Aragon* case[10]; and the Court below, in another case involving the Alaska Workmen's Compensation Act, made reference to this interstate movement of workers:[11]

> "This is one of the many industrial accident cases arising in Alaska, an area in which the difference between Summer and Winter climate causes a

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[7]Sec. 43-3-1, ACLA 1949, as amended. See Appendix, *infra*, p. 30.

[8]Sec. 43-3-10, ACLA 1949. See Appendix, *infra* p. 36.

[9]See *Denison, "Alaska Today"*, pp. 167-169.

[10]*Unemp. Comp. Comm. v. Aragon*, 329 US 143, 146, 91 L ed 136, 141.

[11]*Brown v. Alaska Industrial Board, et al.*, CA-9, 1955, 224 F.2d 680, 681.

large number of employees to engage in two different employments in the course of a year. Many are employed in Alaska in the seasonal employment there and at other times in the States."

This is also pointed out in the statistics of the Alaska Employment Security Commission. The Commission's annual report to the Governor of Alaska for the fiscal year ending June 30, 1956, shows that total unemployment benefit payments were $5,105,948.00, and that of this amount the sum of $1,090,321.00 represented payments to claimants residing in the States.[12]

This demonstrates that interpretations of the Alaska Workmen's Compensation Act have import not only in respect to Alaska residents, but also in respect to the citizens of the several States. The decision of the Court below, it is submitted, is clearly in conflict with the meaning and spirit of the statute, and because of its real significance and effect upon many persons, there is substantial reason to justify a review by this Court.

2. The question presented here is neither simple of solution nor unimportant. The Alaska Industrial Board had difficulties; for it first construed the statute against Jenkins' contentions,[13] and then later it reversed its position and held just the opposite.[14] The District Court referred to the absence of authority on this point.[15] When the matter was presented to the

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[12]See Appendix, *infra*, p. 38.

[13]R. 46-47.

[14]R. 52.

[15]*Chugach Electric Assn., et al. v. Alaska Industrial Board, et al.*, 122 F. Supp. 210, 211 (R. 57).

Court below it was argued twice: once, before the regular three-judge division of the Court on February 14, 1956,[16] and a second time, on November 20, 1956, before all nine judges of the Court of Appeals sitting in banc.[17]

All of the States and Territories have workmen's compensation statutes that provide payments for total and permanent disability,[18] and they also have temporary disability provisions of which, as Judge Denman has pointed out, the Alaska provisions are typical.[19]

In a somewhat similar case decided by the Court below in 1956, the question was whether under the Alaska Act further temporary disability compensation could be allowed while the applicant was receiving compensation for a partial permanent disability or had received a lump sum by award or approved settlement therefor. The Court recognized that this presented

> "... a *serious question,* and one on which we have been able to find little authority."[20] (Emphasis added.)

Larson testifies to the fact that the extent to which schedule allowances should be deemed exclusive is a "most important question of general applicability" in

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[16]R. 84.

[17]R. 86.

[18]*Larson's Workmen's Compensation Law* (1952), Vol. 2, Appendix B, Table 8, pp. 524-526.

[19]R. 103.

[20]*Keehn v. Alaska Industrial Board,* CA-9, 1956, 230 F.2d 712, 715 (footnote 1).

this area.[21] And in the majority opinion of the Court below it was stated that this was

> "... a matter of *public interest* in connection with the administration of an act having *wide application.*" (emphasis added.)[22]

The Court below has established a precedent of wide application in the important field of workmen's compensation. Therefore, the question for decision is one of considerable public interest and importance, and ought to be reviewed by this Court.

CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

Dated, Juneau, Alaska,
July 17, 1957.

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JOHN H. DIMOND,
Counsel for Petitioner Carl E. Jenkins.

(Appendix Follows.)

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[21] *Larson's Workmen's Compensation Law,* Vol. 2, Sec. 58.20, p. 44.

[22] R. 100. See Appendix, *infra,* p. 18.